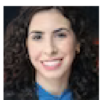
THIRD WAY

LETTER Published June 21, 2023 • 22 minute read

Comments to the Department of Education on Gainful Employment, Financial Value Transparency, and Other Proposed Rules



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June 20, 2023

US Department of Education
400 Maryland Ave. SW
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Docket ID: ED-2023-OPE-0089

To Whom It May Concern:

Thank you for the opportunity to provide comments on the Department of Education's Notice of Proposed Rulemaking (NPRM). Third Way is grateful for the Department's attention to these key

student protection regulations and applauds the robust proposed rules included in this NPRM. The Department's proposals will meaningfully strengthen our nation's higher education system—empowering students with better information for making important choices about their postsecondary education and safeguarding taxpayers' investment in Title IV student aid by ensuring that federal dollars only flow to schools that demonstrate sufficient financial and administrative stability and deliver positive outcomes for the students they enroll.

Below, Third Way provides comments related to the Department's proposals on gainful employment and financial value transparency, financial responsibility, administrative capability, and certification procedures. We support these rules as currently proposed by the Department and seek to offer technical updates and improvements that we believe will strengthen the rules even further and ensure that they are implemented as the Department intends.

Comments on Gainful Employment & Financial Value Transparency

Gainful Employment

Restoring and strengthening the gainful employment (GE) regulation is a significant action to hold career education programs accountable for their student outcomes and prevent taxpayer-funded student aid from propping up poor-quality programs that leave students worse off than before they enrolled. We are extremely pleased that the Department's proposed GE rule includes both the debt-to-earnings rates included in prior iterations of the rule and a new earnings premium measure. Combined, these tests will allow the Department to assess the affordability of GE program graduates' debt loads and whether the typical program completer goes on to earn more than the typical high school graduate in the state in which the program is located—clear measures of return on investment for students and taxpayers and the financial value-add offered by career programs. Fortunately, the majority of eligible GE programs will pass these tests: 93% of public institutions (the sector with the highest number of eligible GE programs) and 97% of non-profit private institutions have no enrollment whatsoever in failing programs, which is a statistic to be celebrated.[1] GE will thus serve to identify bottom-of-the-barrel programs that consistently provide dismal outcomes for students and prevent them from continuing to receive taxpayer dollars.

The debt-to-earnings rates maintained in the Department's rule are important indicators of students' ability to pay back the federal loans taken out to pursue their credential and are well supported by research and by the Department's analysis of Title IV loan data. As noted in the Regulatory Impact Analysis (RIA), borrowers of programs that fail the debt-to-earnings rates are significantly more likely to struggle with repayment and default on their loans: eligible GE programs constitute just 15% of Title IV enrollments yet account for *half* of all enrollments in failing

debt-to-earnings programs and over 65% of defaulters. [2] These are truly unacceptable outcomes for federally-supported programs purporting to provide career training.

The addition of the earnings premium critically strengthens the GE rule's ability to identify the lowest-performing career education programs. Debt-to-earnings calculations offer essential information about a program's effectiveness in preparing students for gainful employment, and the earnings premium provides a direct comparison between students' typical income after graduation and what they could have reasonably expected to make had they never pursued that credential in the first place. Programs with lower borrowing rates, which may pass a debt-to-earnings test because of relatively low debt levels, can still provide no earnings benefit to their graduates and contribute to worse loan repayment outcomes—in fact, borrowers with lower debt levels are often *more* likely to default. We also know from the prior GE rule that debt-to-earnings rates alone did not capture all programs with problematic outcomes: as of 2017, over 1,700 career education programs left their graduates earning below the federal poverty line, while only 4% would have failed the original 2014 rule. [3] As the Department's data indicate, 16% of all Title IV recipients attending GE programs (nearly half a million students) are enrolled in programs where the typical graduate does not go on to have income parity with or out-earn their peers with just a high school diploma, and default rates among students attending programs that pass the debt-to-earnings test but fail the earnings premium are *higher* than those attending programs that fail debt-to-earnings but pass the earnings test.

Post-completion earnings matter to students and significantly impact their ability to sustain their families and repay their student loans. We strongly support the addition of the earnings premium measure alongside debt-to-earnings rates to capture programs that consistently strand borrowers with subpar financial outcomes and at heightened risk of loan default. Likewise, we support the Department's decision to use a state-based median earnings threshold, which sets a reasonable bar connected to the economic conditions of the labor market students are likely to enter upon completion of their program. Regarding the Department's question about calculating the earnings threshold for US territories for which earnings data for high school graduates may be less readily available, we recommend using inflation-adjusted income data from the decennial census for this purpose; for Puerto Rico, income data is available through the US Census Bureau's American Community Survey and Puerto Rico Community Survey.

We also recommend that the Department consider establishing a higher earnings threshold for eligible GE programs at the graduate level, such as the typical salary of bachelor's degree holders in the same field of study within the state in which the program is located. It is only reasonable that students in graduate credential and degree programs should expect to earn more than they could have with their bachelor's degree alone. Any graduate degree GE program worth its salt should certainly be expected to pass a high school earnings threshold, and the bar should be higher when considering the financial investment, opportunity costs, and expected returns from enrolling in graduate education.

In response to the Department's directed question regarding calculating the earnings premium measure and any adjustments to the calculation in §668.404, we recommend the use of the list of persistent poverty counties compiled by the Economic Development Administration to identify economically disadvantaged geographic areas in which eligible GE programs may experience unique challenges to their graduates' meeting or surpassing a median statewide earnings threshold. Persistent poverty counties are those that have had poverty rates of at least 20% for at least 30 years; this designation has been applied to anti-poverty interventions in federal policy as recently as the 117th Congress, reflecting significant research showing that areas in which more than 20% of the population is living below the poverty line over multiple decades face acute, systemic challenges distinct from other high-poverty areas. The number of counties designated as having persistent poverty has ranged from approximately 350 to 500 of the 3,100 US counties and county-equivalent areas.[4] Using a program's physical presence within a persistent poverty county as the basis for receiving an exemption from the earnings premium measure establishes a reasonable pathway for programs to appeal a failing earnings premium result that is grounded in existing legal definitions.

We support a limited appeals structure in which programs that are both located in persistent poverty counties and can demonstrate that a significant proportion of enrolled students—at least 50%—are living in that county or county-equivalent area can be eligible for an exemption from the earnings premium measure for the remainder of the institution's Program Participation Agreement (PPA). This exemption should apply only to the earnings premium test in the GE rule—*not* the debt-to-earnings rates—and should not affect the disclosures and attestations required separately from all programs as part of the Department's financial value transparency regulations. To safeguard against abuse and prevent the creation of a loophole that swallows the rule, any appeals process tied to the persistent poverty classification should stipulate that eligible programs must already have been operating in the designated county or county-equivalent area for at least one year prior to the issuance of the final GE rule. Combined with eligibility criteria that require both the program and most of its enrolled students to reside in the covered area, this will ensure that predatory programs are not incentivized to set up shop in high-poverty areas and deliver shoddy programs to students with the highest need, while also preventing fully online programs from qualifying for exemptions from the earnings test by focusing their recruiting efforts within communities of persistent poverty far from where they are headquartered.

Financial Value Transparency

We strongly support the Department's proposed financial value transparency disclosures, which will apply to nearly all college programs across sectors and credential levels and provide prospective and enrolled students with better, more comprehensive information about the typical costs and outcomes of different program options. Given that the potential consequence of losing Title IV access is statutorily limited to eligible GE programs, the Department will take major strides to improve transparency and drive institutional improvement through the newly required disclosures.

By including in these disclosures both the debt-to-earnings measures and earnings premium incorporated in the GE rule, alongside other potential data points like rates of completion and withdrawal, median student earnings post-graduation, and estimated expenses a student may incur over the duration of the program, the Department will equip students with timely and relevant information to help them identify the best-fit program for their needs and goals. In addition to these important variables, we recommend the Department require institutional reporting on the distance education status of students across programs, as such information is of increasing value to prospective students given the rise in online and distance education program enrollments.

This newly reported and available information will also complement other public data sources like the College Scorecard and Integrated Postsecondary Education Data System (IPEDS) by improving the accessibility and quality of higher education data for research and policy development related to federal student aid. It should likewise promote targeted institutional improvement efforts by allowing institutions to analyze the value proposition their programs offer to students and identify areas for improvement in ensuring students receive a strong return on their investment. While implementing these disclosures will place an additional reporting burden on institutions in the short term, the long-term benefits of the availability of these data for students *and* institutions make those efforts well worth it. We appreciate the Department's expressed intention to provide training and reporting guidelines to institutions and encourage the development of dedicated training opportunities to support schools in accurately and efficiently reporting these new data.

The Department's proposed rule would entail collecting data and calculating and disclosing program results for both the debt-to-earnings and earnings premium measures outlined in GE for non-GE programs across sectors, institution types, and credential levels. However, the Department presently proposes requiring students who are entering or continuing enrollment in a non-GE program to submit an attestation that they have viewed relevant disclosures prior to the disbursement of federal aid in the event their program fails the debt-to-earnings rates—but not if the program fails the earnings premium. We recommend that the Department expand the attestation requirement to include program failures on the earnings premium as well as the debt-to-earnings rates. The Department contends that "non-GE programs are more likely to have nonpecuniary goals" and that "requiring students to acknowledge low-earning information as a condition of receiving aid might risk conveying that economic gain is more important than nonpecuniary considerations." [5] In reality, earnings outcomes are of great importance to most students: getting a good job and moving up the income ladder is the number one reason students choose to pursue higher education in the first place. [6] Rather than implying that the economic gains a student may receive from their program are of higher value than the many nonpecuniary benefits of higher education, providing this information and requiring an attestation before entering programs that do not offer a positive earnings premium equips prospective and enrolled

students with essential information to inform their choices as to the best-fit option for their personal goals—be they pecuniary or nonpecuniary in nature.

The GE rule is an essential protection against low-performing programs that leave students with unmanageable debt, low earnings, or both. These bottom-of-the-barrel programs harm students and waste taxpayer dollars, and it is imperative that the Department finalize and implement its GE rule as quickly as practicable. Of the two components in this section—the GE rule that applies to eligible career education programs as dictated by statute and the financial value transparency disclosures that will apply to all programs—successfully and swiftly implementing GE and holding failing programs accountable must be the Department's priority.

Comments on Financial Responsibility

The Department's financial responsibility rules are critical to ensuring that institutions eligible to participate in federal financial aid programs are themselves financially viable, capable of meeting their financial obligations, and acting as good stewards of taxpayer dollars. We appreciate the Department's efforts to strengthen its ability to identify when institutions are at high risk of financial instability, require financial protection, and pose risks to students through precipitous closure.

The Department posed a directed question related to §668.171(f)(1)(iii) as to whether investigations described in that section warrant inclusion as a financial trigger. We believe that if an institution receives a civil investigative demand, subpoena, or request for documents or information from a government agency, this rises to the level of a discretionary trigger and gives the Department due cause to review the institution's fitness to sustain its financial obligations. We support clear indication of these triggers in the final rule.

We also propose one technical recommendation in response to the proposed rule in this section related to the Department's requirement for institutions to disclose their spending on instruction and instructional activities. We strongly support the Department's intent to require institutions to disclose the amount spent in a fiscal year on recruiting activities, advertising, and other pre-enrollment expenditures through a footnote in their audited financial statements. This type of disclosure will ensure the Department has useful information on whether schools are directing their financial resources to marketing and recruiting rather than investing in student instruction—which could indicate a misdirection of resources or focus on increasing enrollments rather than teaching and learning for enrolled students. However, we urge the Department to expand this disclosure requirement. In addition to the pre-enrollment expenditures for which the Department proposes to require disclosures in §668.23(d)(5), we recommend the Department require that the footnote also contain a separate notation with "the amounts the institution spent on instruction and instructional activities, academic support, and support services." This addition will allow the Department to effectively implement its proposals elsewhere in these rules for a number of supplementary performance measures that the Secretary may consider in determining whether or

how to allow or continue an institution's participation in the Title IV programs. One of those relates to "educational and pre-enrollment expenditures," which the Department notes would be evaluated through a disclosure in audited financial statements as required under proposed §668.23. The discrete addition of instructional spending disclosures will thus provide the Department with the information it needs to assess both aspects of this proposed supplementary performance measure.

Comments on Administrative Capability

We are grateful for the Department's attention to the standards that Title IV eligible institutions must meet to demonstrate they are administratively capable of complying with all facets of the federal student aid program's policies and procedures. The additional standards proposed through this rule will more stringently ensure that schools participating in taxpayer-supported federal financial assistance programs are held to account and that the Department can respond appropriately to compliance concerns.

We are supportive of the Department's amendments in §668.16(p) to strengthen requirements for institutions to devise and adhere to adequate procedures for evaluating the validity of high school diplomas as part of their demonstration of administrative capability. The provisions laid out by the Department—particularly the stipulation that the Department does not deem a high school diploma to be valid if it does not meet state requirements where applicable or is obtained from a high school that has a business relationship with the institution of higher education—are important additions that will help ensure the integrity of the Title IV programs. Additionally, we support the Department's addition in §668.16(q) requiring that institutions provide adequate career services to Title IV student aid recipients. Institutions that do not possess the resources necessary to offer promised career services or experiences cannot be said to have the administrative capability required to effectively serve their student bodies.

We are very pleased to see the Department include language requiring institutions to provide adequate counseling and communications on financial aid to students and families as a standard of administrative capability. There is woefully little consistency or standardization in how colleges convey information on costs of attendance and financial aid eligibility to accepted students, leaving them with limited ability to make apples-to-apples comparisons of their college options. [7] These regulations offer an opportunity for the Department to provide students and their families with more transparent and useful information about what college will cost them, the sources of aid that are available for them to consider, and how to navigate the process of accepting, declining, or adjusting that aid.

To this end, we recommend the Department strengthen its proposed rules by improving the definition of financial aid "communication," which in its present form is overly broad, to clarify that this means "any communication made to the student detailing his or her financial aid package." Additionally, the Department should provide further clarity around how institutions

should counsel students "to accept the most beneficial types of financial assistance available to them" to make it clear that such counseling should prioritize accepting grants and scholarships that do not require repayment first, followed by federal subsidized and unsubsidized loans, followed by other federal loan and private financing options (which may offer fewer protections). This is also important as it relates to the inclusion of Parent PLUS loans in financial aid offers: the Department should exclude PLUS loans from being listed at a specific dollar amount to prevent institutions from including PLUS loans as a strategy to zero out their financial aid offers. Given that Parent PLUS loans have more limited options and weaker consumer protections for borrowers, they should be positioned alongside other options that can be used to cover a student's remaining balance after grants, scholarships, and subsidized or unsubsidized federal loans are exhausted.

We support the following suggested changes to the Department's proposed language in §668.16(h) in below, as developed by New America:

(h) Provides adequate financial aid counseling with clear and accurate information to students who apply for title IV, HEA program assistance. In determining whether an institution provides adequate counseling, the Secretary considers whether its counseling and financial aid communications advise students and families to accept the most beneficial types of financial assistance available to them and include information regarding— and any communication made to the student detailing his or her financial aid package include information regarding—

(1) The cost of attendance of the institution as defined under section 472 of the HEA, including the individual components of those costs and a total of the estimated costs that will be owed directly to the institution, for students, based on their attendance status;

(2) The source and amount of each type of aid offered, excluding an amount for Federal Parent PLUS loans, private education loans, state loans, institutional loans, and income-share agreements, separated by the type of the aid and whether it must be earned or repaid;

(3) The net price, as determined by subtracting total grant or scholarship aid included in paragraph (h)(2) of this section from the cost of attendance in paragraph (h)(1) of this section;

(4) The method by which aid is determined and disbursed, delivered, or applied to a student's account, and instructions and applicable deadlines for accepting, declining, or adjusting award amounts; and

(5) Accepting the most beneficial types of financial assistance available to them, including prioritizing grants and scholarships, followed by federal subsidized and federal unsubsidized loans before other aid options including Federal Parent PLUS Loans, Federal Grad PLUS loans, private education loans, state loans, institutional loans, and income-share agreements; and

(5)(6) The rights and responsibilities of the student with respect to enrollment at the institution and receipt of financial aid, including the institution's refund policy, the requirements for the treatment of title

IV, HEA program funds when a student withdraws under §668.22, its standards of satisfactory progress, and other conditions that may alter the student's aid package;

Comments on Certification Procedures

The Department has taken several critical steps in its proposed regulations in §668.13 and §668.14 to ensure rigorous procedures for certifying institutions to participate in federal financial assistance programs through a Program Participation Agreement (PPA), and these rules are essential to protecting the interests of students and taxpayers.

We commend the Department's attention to core consumer protection issues within these regulations. By amending §668.13(b)(3) to remove the provision that the Department must automatically approve participation for an institution after 12 months of inaction on a certification application, the Department will give itself the time it needs to complete pending investigations and review pressing concerns. This benefits students and taxpayers while still allowing for process clarity for institutions. By adding to §668.13(c)(1)(i)(F), the Secretary will have the important option of placing an institution on a provisional PPA if it is determined to be at risk of closure—enhancing ease of implementation with other parts of these rules and proactively addressing the significant disruption posed when schools close abruptly, including loss of students' transfer credits, discontinuity from teach-out plans not being established, and financial losses for taxpayers and students. Further, by adding §668.14(a)(3) to specify that an institution's PPA must be signed by an authorized representative of the institution and that the PPA for proprietary and private non-profit institutions must additionally be signed by any entity with direct or indirect ownership or control over the institution, the Department will be better positioned to hold eligible entities liable and recoup taxpayer losses incurred in the event of closure, as pursuant to the Department's closed school discharges regulation.

In response to the Department's directed question regarding the time limit for required reassessment of provisionally certified institutions that have significant consumer protection concerns under §668.13(c), we recommend maintaining the proposed two-year limit. We further suggest that a two-year limit should be the maximum window the Department considers and propose that a one-year limit would offer stronger protection for students. Given that these are cases in which institutions are typically under provisional certification as a result of claims related to consumer protection laws, the Department should pursue the most stringent timeline possible for reassessing provisional certification in the interest of enrolled students.

While we strongly support the Department's proposal in §668.14(b)(32)(iii) to require that institutions must determine that each of their eligible programs are compliant with all state consumer protection laws related to closure, recruitment, and misrepresentations in instances where the institution is operating in multiple states under a reciprocity agreement, we believe the language can be improved to provide greater clarity. The Department's proposed language could be interpreted to imply that institutions that operate in multiple states and do *not* participate in a

reciprocity agreement are not required to be in compliance with state laws in the states in which they operate with the exception of the three specified categories of closure, recruitment, and misrepresentations; the Department should explicitly clarify that they are liable to all state laws in its final rule. Moreover, the proposed language could be incorrectly understood to imply that institutions operating in multiple states and participating in a reciprocity agreement are *only* required to comply with generally applicable state laws related to closure, recruitment, and misrepresentations, and the Department should amend this language to affirm that such institutions are subject to *all* generally applicable state laws as well as specific state laws related to closure, recruitment, and misrepresentations.

We support the following recommended changes to the language in §668.14(b)(32), as developed by researchers at the The Century Foundation. To further strengthen protections for online students attending State Authorization Reciprocity Agreements (SARA) member schools, we would also support an expansion of the language in this section to require institutions to comply with all state consumer protection laws in the states where the institution is authorized pursuant to a reciprocity requirement.

In each State in which the institution is located or in which students enrolled by the institution are located, as determined at the time of initial enrollment in accordance with 34 CFR 600.9(c)(2), the institution must determine that each program eligible for title IV, HEA program funds—

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(iii)

(A) Complies with all applicable State laws; and

(B) For institutions covered by a state authorization reciprocity agreement as defined in 34 CFR 600.2, notwithstanding any limitations in that agreement, complies with all State higher education requirements, standards, or laws related to risk of institutional closure or to recruitment and marketing practices, and with all State general-purpose laws, including but not limited to those related to misrepresentations, fraud, or other illegal activity;

Lastly, we applaud the Department's actions to institute more rigorous review of changes in institutional ownership to convert to non-profit status in §668.14(f) and §668.14(g), as well as the prohibition against transcript withholding for Return to Title IV and in cases of institutional mistakes or misconduct in §668.14(b)(33), as these steps will ensure appropriate institutional oversight and strengthen protections against harmful practices for students and borrowers.

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We are deeply appreciative of the Department's efforts through these robust regulations to ensure better value, return on investment, and post-college outcomes for students and to promote meaningful accountability for institutions participating in Title IV federal student aid programs.

Thank you for your time and consideration of these comments, and please do not hesitate to contact us should you have any questions.

Sincerely,

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TOPICS

HIGHER EDUCATION 635

ENDNOTES

1. Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB), 88 Fed. Reg. 32424 (May 19, 2023).

2. Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB), 88 Fed. Reg. 32300 (May 19, 2023).

3. Itzkowitz, Michael, and Clare Bain. "How Low Does the Gainful Employment Bar Go?" *Third Way*, 26 Sep. 2017, www.thirdway.org/infographic/how-low-does-the-gainful-employment-bar-go.

4. Benson, Craig, Alemayehu Bishaw & Brian Glassman. "Persistent Poverty in Counties and Census Tracts." *US Census Bureau*, May 2023, www.census.gov/library/publications/2023/acs/acs-51.html.

5. Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB), 88 Fed. Reg. 32338 (May 19, 2023).

6. GALLUP. "Why Higher Ed?" *Strada-Gallup Education Consumer Survey*, news.gallup.com/reports/226457/why-higher-ed.aspx.

7. Burd, Stephen, et al. "Decoding the Cost of College: The Case for Transparent Financial Aid Offer Letters." *New America and uAspire*, 5 Jun. 2018, www.newamerica.org/education-policy/policy-papers/decoding-cost-college/. See also: US Government Accountability Office. "Financial Aid Offers: Action Needed to Improve Information on College Costs and Student Aid." 1 Nov. 2022, www.gao.gov/products/gao-23-104708.